UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK 14 CV 8381

JUDGE OETKEN

---X

TIMOTHY DENDY and JASON POLK,

Plaintiffs,

14 Civ.

-against-

COMPLAINT

NATIONAL RAILROAD PASSENGER CORP.,

Defendant.

---X

U.S.D.C. S.D.N.Y.

PLAINTIFFS DEMAND TRIAL BY JURY

Plaintiffs, by their attorneys, Flynn & Wietzke, PC, complain of the defendant and allege:

AS AND FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANT NATIONAL RAILROAD PASSENGER CORP. BY PLAINTIFF TIMOTHY DENDY

FIRST: The plaintiff, Timothy Dendy, brings this action against the defendant for violations of the Federal Rail Safety Act, 49 U.S.C. Section 20109.

SECOND: This Court has subject matter jurisdiction in this case pursuant to the Federal Railroad Safety Act, 49 U.S.C. Section 20109(d)(3) (FRSA).

THIRD: The plaintiff is of New Rochelle, New York.

FOURTH: The defendant is a railroad carrier providing railroad transportation, with a usual place of business in New Jersey and New York and various other states.

FIFTH: During all times herein mentioned, the defendant is engaged in interstate commerce by providing railroad transportation between the states of New York and New Jersey.

SEVENTH: On June 26, 2013, plaintiff was threatened with disqualification from his position as a result of engaging in protected activity, to wit, reporting of safety hazards on train cars. Then, on July 1, 2013, plaintiff was in fact disqualified from the position. Thereafter, plaintiff was penalized, harassed and intimidated for reporting the incident.

EIGHTH: As a result of defendant's conduct, the plaintiff suffered various economic harms as well as emotional distress and mental anguish.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST
DEFENDANT NATIONAL RAILROAD PASSENGER CORP.
BY PLAINTIFF TIMOTHY DENDY

NINTH: The plaintiff adopts by reference and realleges each and every allegation set forth in paragraphs FIRST through EIGHTH of this Complaint with the same force and effect as if set forth under this cause of action.

TENTH: The plaintiff engaged in protected activity under the FRSA when he reported safety hazards in and about the defendant's rail cars.

ELEVENTH: The defendant had knowledge of all the protected activities referenced above.

TWELFTH: The defendant took adverse or unfavorable actions against the plaintiff in whole or in part due to his protected activities when on June 26, 2013, plaintiff was threatened with disqualification from his position as a result of engaging in protected activity, to wit, reporting of safety hazards on train cars and then, on July 1, 2013, plaintiff was in fact disqualified from the position. In so doing, the defendant acted with reckless disregard for the law and with complete indifference to the plaintiff's rights under the FRSA.

THIRTEENTH: On December 23, 2013, the plaintiff filed a FRSA Complaint with the Secretary of Labor's Region 2 OSHA Whistleblower Office. (Exhibit 1). That was within 180 days from the date the plaintiff became aware of the defendant Railroad's intent to take adverse or unfavorable personnel action against him.

FOURTEENTH: The Region 2 OSHA Whistleblower Office commenced its investigation, and the plaintiff fully cooperated with OSHA's investigation. However, OSHA did not issue a final decision within 210 days after the filing of the FRSA Complaint. The delay was not due to any bad faith on the part of the plaintiff.

FIFTEENTH: Pursuant to Section (d)(3) of the FRSA, the plaintiff has a statutory right to bring an original action in a United States district court for a jury trial regarding the Railroad's violations of the FRSA. 49 U.S.C. Section 20109(d)(3). On August 7, 2014, the plaintiff filed with the US Department of Labor a Notice of Intent to File Original Action. (Exhibit 2)

SIXTEENTH: Pursuant to FRSA 49 U.S.C. 20109(d)(3), the plaintiff now is bringing this original action at law and equity for de novo review by the United States District Court for the Southern District of New York, which Court has jurisdiction over this FRSA action without regard to the amount in controversy.

WHEREFORE, in order to encourage employees to freely report all injuries and safety concerns without fear of any retaliation, thereby ensuring the Federal Rail Administration has the necessary information to develop and administer an effective rail safety regulatory program that promotes safety in every area of our nation’s railroad operations, the plaintiff demands a Judgment under the FRSA for all relief necessary to make him whole, including but not limited to: reinstatement to his prior position; lost benefits with interest; lost wages with interest; compensatory damages for economic losses due to defendant’s conduct; compensatory damages for mental anguish and emotional distress due to defendant’s conduct; the statutory maximum of punitive damages; and special damages for all litigation costs including expert witness fees and attorney fees.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST
DEFENDANT NATIONAL RAILROAD PASSENGER CORP.
BY PLAINTIFF JASON POLK

SEVENTEENTH: The plaintiff adopts by reference and realleges each and every allegation set forth in paragraphs FIRST through SIXTEENTH of this Complaint with the same force and effect as if set forth under this cause of action.

EIGHTEENTH: The plaintiff, Jason Polk, brings this action against the defendant for violations of the Federal Rail Safety Act, 49 U.S.C. Section 20109.

NINTEENTH: This Court has subject matter jurisdiction in this case pursuant to the Federal Railroad Safety Act, 49 U.S.C. Section 20109(d)(3) (FRSA).

TWENTIETH: The plaintiff is of New Rochelle, New York.

TWENTY-FIRST: The defendant is a railroad carrier providing railroad transportation, with a usual place of business in New Jersey and New York and various other states.

TWENTY-SECOND: During all times herein mentioned, the defendant is engaged in interstate commerce by providing railroad transportation between the states of New York and New Jersey.

TWENTY-THIRD: At the time of the defendant's FRSA violations, the plaintiff was employed by the defendant as a lead car inspector and qualified as an employee within the meaning of 49 U.S.C. Section 20109.

TWENTY-FOURTH: On June 26, 2013, plaintiff was threatened with disqualification from his position as a result of engaging in protected activity, to wit, reporting of safety hazards on train cars. Then, on July 1, 2013, plaintiff was in fact disqualified from the position. Thereafter, plaintiff was penalized, harassed and intimidated for reporting the incident.

TWENTY-FIFTH: As a result of defendant's conduct, the plaintiff suffered various economic harms as well as emotional distress and mental anguish.

AS AND FOR A FOURTH CAUSE OF ACTION AGAINST
DEFENDANT NATIONAL RAILROAD PASSENGER CORP.
BY PLAINTIFF JASON POLK

TWENTY-SIXTH: The plaintiff adopts by reference and realleges each and every allegation set forth in paragraphs FIRST through TWENTY-FIFTH of this Complaint with the same force and effect as if set forth under this cause of action.

TWENTY-SEVENTH: The plaintiff engaged in protected activity under the FRSA when he reported safety hazards in and about the defendant's rail cars.

TWENTY-EIGHTH: The defendant had knowledge of all the protected activities referenced above.

TWENTY-NINTH: The defendant took adverse or unfavorable actions against the plaintiff in whole or in part due to his protected activities when on June 26, 2013, plaintiff was threatened with disqualification from his position as a result of engaging in protected activity, to wit, reporting of safety hazards on train cars and then, on July 1, 2013, plaintiff was in fact disqualified from the position. In so doing, the defendant acted with reckless disregard for the law and with complete indifference to the plaintiff's rights under the FRSA.

THIRTIETH: On December 23, 2013, the plaintiff filed a FRSA Complaint with the Secretary of Labor's Region 2 OSHA Whistleblower Office. (Exhibit 3). That was within 180 days from the date the plaintiff became aware of the defendant Railroad's intent to take adverse or unfavorable personnel action against him.

THIRTY-FIRST: The Region 2 OSHA Whistleblower Office commenced its investigation, and the plaintiff fully cooperated with OSHA's investigation. However, OSHA did not issue a final decision within 210 days after the filing of the FRSA Complaint. The delay was not due to any bad faith on the part of the plaintiff.

THIRTY-SECOND: Pursuant to Section (d)(3) of the FRSA, the plaintiff has a statutory right to bring an original action in a United States district court for a jury trial regarding the Railroad's violations of the FRSA. 49 U.S.C. Section 20109(d)(3). On August 7, 2014, the plaintiff filed with the US Department of Labor a Notice of Intent to File Original Action. (Exhibit 2)

THIRTY-THIRD: Pursuant to FRSA 49 U.S.C. 20109(d)(3), the plaintiff now is bringing this original action at law and equity for de novo review by the United States District Court for the Southern District of New York, which Court has jurisdiction over this FRSA action without regard to the amount in controversy.

WHEREFORE, in order to encourage employees to freely report all injuries and safety concerns without fear of any retaliation, thereby ensuring the Federal Rail Administration has the necessary information to develop and administer an effective rail safety regulatory program that promotes safety in every area of our nation's railroad operations, the plaintiff demands a Judgment under the FRSA for all relief necessary to make him whole, including but not limited to: reinstatement to his prior position; lost benefits with interest; lost wages with interest; compensatory damages for medical expenses incurred due to defendant's conduct; compensatory damages for economic losses due to defendant's conduct; compensatory damages for mental anguish and emotional distress due to defendant's conduct; the statutory maximum of punitive damages; and special damages for all litigation costs including expert witness fees and attorney fees.

WHEREFORE, plaintiff Timothy Dendy demands judgment against the defendant on the First Cause of Action in the sum of FOUR HUNDRED FIFTY THOUSAND ($450,000.00) DOLLARS; plaintiff Timothy Dendy demands judgment against the defendant on the Second Cause of Action in the sum of FOUR HUNDRED FIFTY THOUSAND ($450,000.00) DOLLARS; plaintiff Jason Polk demands judgment against the defendant on the Third Cause of Action in the sum of FOUR HUNDRED FIFTY THOUSAND ($450,000.00) DOLLARS; plaintiff Jason Polk demands judgment against the defendant on the Fourth Cause of Action in the sum of FOUR HUNDRED FIFTY THOUSAND ($450,000.00) DOLLARS; together with the costs and disbursements of this action.

Flynn & Wietzke, PC
Attorneys for Plaintiff
1205 Franklin Avenue
Garden City, NY 11530
(516) 877-1234

/s/
By:________________________________

MARC T. WIETZKE (MW1551)

EXHIBIT 1

FLYNN & WIETZKE, P.C.

1205 Franklin Avenue, Suite 370
Garden City, N.Y. 11530
Tel: (516) 877-1234 Fax: (516) 877-1177

Michael Flynn, Esq.
Marc Wietzke, Esq.

Offices throughout the Northeast
Toll Free: (866) 877-FELA

†Also admitted in NJ

December 23, 2013

John Schreck
Supervisory Investigator
OSHA Whistleblower Program
201 Varick Street, Room 908
New York, New York 10014

Re: TIMOTHY DENDY v. NATIONAL RAILROAD PASSENGER CORP

Dear Mr. Schreck:

This office has been retained by Timothy Dendy with regard to discriminatory and intimidating actions taken against him by his employer, National Railroad Passenger Corp, aka Amtrak. Please consider this Mr. Dendy's formal complaint against Amtrak under the Federal Rail Safety Act, 49 USC §20109, the Railroad Whistleblower Law.

STATEMENT OF FACTS

Mr. Dendy hired on with Amtrak on August 5, 2007. A resident of lower Westchester County, New York, he has spent his entire tenure working out of Amtrak's Sunnyside Yard, in Queens, New York. Mr. Dendy worked as a car inspector for Amtrak. From June 6, 2013 to June 12, 2013, Mr. Dendy and another employee named Jason Polk took part in a program offered by Amtrak to become a Lead Car Inspector. Both were awarded a certificate of completion on June 12, 2013. As a Lead Car Inspector, they were trained and tasked with noting all kinds of safety concerns in Amtrak cars, both inside and out. This was done by literally walking through the cars and walking around the cars and writing down the defects. The defects were tabulated on sheets of paper and then transferred onto Amtrak forms called Maintenance Analysis Program Worksheets. These sheets were then in turn to be used to guide the maintenance and repair of the cars.

On June 26, 2013, Foreman Felix Hull threatened Mr. Dendy and Mr. Polk with disqualification from the job if their jobs if they did not stop finding so many safety defects. This was in response to both men turning in pages of defects from the cars they had inspected shortly before that. Amtrak, through General Foreman Joe Lampey, made good on those threats by disqualifying both men on July 1, 2013. This forced the men to go to a different shift, as well as standing as an example to others what happens when you do your safety-related job at Amtrak – you get punished.

PROPOSED FINDINGS

Respondent is a railroad carrier within the meaning of 49 U.S.C. §§ 20109 and 20102. Respondent is engaged in interstate and/or foreign commerce within the meaning of 49 U.S.C. § 20109. Complainant is a member of the Transport Workers Union (TWU). Respondent employed Complainant as a Car Inspector.

RESPONDENT'S LIABILITY

APPLICABLE PROVISIONS OF FRSA

Complainant hereby alleges that Respondent violated 49 U.S.C.§ 20109(a) and (b), which provide:

(a) A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done –

> **(1)** to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee

reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—

(A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95–452);
(B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or
(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;

(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding;

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

(5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

(6) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or

(7) to accurately report hours on duty pursuant to chapter 211.

(b) Hazardous Safety or Security Conditions.—
(1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for—

(A) reporting, in good faith, a hazardous safety or security condition;

(B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee’s duties, if the conditions described in paragraph (2) exist; or

(C) refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) exist.

(2) A refusal is protected under paragraph (1)(B) and (C) if—
(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that—

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

(C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

ELEMENTS OF FRSA AND BURDENS OF PROOF

Actions brought under FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford. Aviation Investment and Reform Act for the 21st Century. ("AIR 21") *See* 40 U.S.C. § 201209(d)(2)(A)(i). Accordingly, to prevail, a FRSA complainant must demonstrate that: (1) the employer is subject to the Act; (2) the employee is a covered employee under the Act; (3) the employee engaged in protected activity, as statutorily defined; (4) the employer knew that the employee engaged in the protected activity; (5) the employee suffered an unfavorable personnel action; and (6) the protected activity was a contributing factor in the unfavorable personnel action. *See* 40 U.S.C. § 42121(b)(2)(B)(iii); Clemmons v. Ameristar Airways Inc., et al., ARB No. 05-048, ALJ No. 2004-AIR-11, slip op at 3(ARB June 29, 2007).

The term "demonstrate" as used in AIR-21, and thus FRSA, means to "prove by a preponderance of the evidence." *See* Peck v. Safe Air Int'l, Inc., ARB No. 02-028, ALJ No. 01-AIR-3, slip op. at 9 (ARB Jan. 30, 2004). Thus, Complainant bears the burden of providing his case by a preponderance of the evidence. If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior. *See* 49 U.S.C. §§ 20109(d)(2)(A)(i); 42121(b)(2)(B)(iii(iv).

Turning to each of these requirements specifically:

(1) the employer is subject to the Act;

It is undisputed that Respondent Amtrak is an employer subject to the FRSA.

(2) the employee is a covered employee under the Act;

It is undisputed that Mr. Dendy is a covered employee under the Act.

(3) the employee engaged in protected activity, as statutorily defined;

Mr. Dendy engaged in protected activity when he conducted the required inspections of the train cars, in fact finding numerous deficiencies and reported those deficiencies to the company.

(4) the employer knew that the employee engaged in the protected activity;

It is undisputed that Respondent knew that Mr. Dendy engaged in the protected activity. It is in fact this precise activity that prompted the disqualification.

(5) the employee suffered an unfavorable personnel action; and

It is undisputed that the disqualification, and concomitant loss of pay is an unfavorable personnel action, as well as being forced to work a different shift.

(6) the protected activity was a contributing factor in the unfavorable personnel action. "A contributing factor is any factor which, alone or in connection with other factors,

tends to affect in any way the outcome of railroad's decision." Thus, if the employee's protected activity played any part at all, even to the slightest degree, in bringing about the railroad's adverse discriminatory actions, then that protected activity was a contributing factor. Araujo v. NJ Transit Rail Operations, Inc., 708 F.3d 152 (3d Cir. 2013) citing OSHA's Final Interim Rule for "Procedures for the Handling of Retaliation Complaints under the Federal Rail Safety Act," at III. Summary and Discussion of Regulatory Provisions, Section 1982.104, quoting *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), and 135 Cong. Rec. 5033 (1989). 29 CFR Section 1982.104; *Majali v. U.S.Dept. of Labor*, 294 Fed. Appx. 562, 566-567, 2008 U.S.App. LEXIS 29738 (11^{th} Cir. 2008).

Thus, not only was the protected activity a contributing factor, it was in fact the sole basis for the disqualification. Respondent violated the statutes involved when it disqualified Mr. Dendy for writing up too many deficiencies.

CONCLUSION

In short, Respondent truly does not see the error of its ways or the chilling effect that its actions have on worker and public safety. By disqualifying Mr. Dendy, the carrier is making sure all others see what happens when someone finds safety violations, thereby slowing the turnaround of train cars. Mr. Dendy is entitled to reinstatement with full back pay, plus interest, plus compensation for his stress and mental anguish and the tarnish placed on his reputation, as well as punitive damages and attorney fees and any costs related to asserting his rights.

Very truly yours,
Flynn & Wietzke, PC

By: Marc Wietzke
MARC WIETZKE

MW:MW

EXHIBIT 2

U.S. DEPARTMENT OF LABOR

Case No. 2014-FRS-00130
2014-FRS-00131

August 7, 2014

In the Matter of

TIMOTHY DENDY
JASON POLK

Complainant

v.

NATIONAL RAILROAD PASSENGER CORP.
(AMTRAK)

Respondent

NOTICE OF INTENTION TO FILE ORIGINAL ACTION

IN UNITED STATES DISTRICT COURT

Pursuant to the provisions of the Federal Rail Safety Act, 49 U.S.C. 20109(d)(3), the Complainant hereby gives notice of his intent to file an original action in the United States District Court. The Complainant's FRSA Complaint was filed more than 210 days ago, and as of this date the Secretary of Labor has not issued a final decision.

FOR THE CLAIMANTS
TIMOTHY DENDY & JASON POLK

BY: ________/S/________________________
Marc T. Wietzke [mw1551]
Flynn & Wietzke, PC
1205 Franklin Avenue, Suite 370
Garden City, NY 11530
(516) 877-1234

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed, postage prepaid, on this 7th day of August, 2014 to:

Regional Administrator Region 2
Occupational Safety & Health Administration
201 Varick St., Room 670
New York, NY 10014

Assistant Secretary Region 2
Occupational Safety & Health Administration
201 Varick St., Room 670
New York, NY 10014

Associate Solicitor
U.S. Department of Labor
Division of Fair Labor Standards
200 Constitution Ave, NW, N2716
Washington, DC 20210

Robert D. Corl
National Railroad Passenger Copr.
60 Massachusetts Avenue, NE
Washington, DC 20002

James Durkin
OSHA Whistleblower Program
201 Varick Street, Room 908
New York, New York 10014

/S/
Marc T. Wietzke [mw1551]

EXHIBIT 3

FLYNN & WIETZKE, P.C.
1205 Franklin Avenue, Suite 370
Garden City, N.Y. 11530
Tel: (516) 877-1234 Fax: (516) 877-1177

Michael Flynn, Esq.
Marc Wietzke, Esq. †

†Also admitted in NJ

Offices throughout the Northeast
Toll Free: (866) 877-FELA

December 23, 2013

John Schreck
Supervisory Investigator
OSHA Whistleblower Program
201 Varick Street, Room 908
New York, New York 10014

Re: JASON POLK v. NATIONAL RAILROAD PASSENGER CORP

Dear Mr. Schreck:

This office has been retained by Jason Polk with regard to discriminatory and intimidating actions taken against him by his employer, National Railroad Passenger Corp, aka Amtrak. Please consider this Mr. Polk's formal complaint against Amtrak under the Federal Rail Safety Act, 49 USC §20109, the Railroad Whistleblower Law.

STATEMENT OF FACTS

Mr. Polk hired on with Amtrak on October 15, 2012. A resident of lower Westchester County, New York, he has spent his entire tenure working out of Amtrak's Sunnyside Yard, in Queens, New York. Mr. Polk worked as a car inspector for Amtrak. From June 6, 2013 to June 12, 2013, Mr. Polk and another employee named Timothy Dendy took part in a program offered by Amtrak to become a Lead Car Inspector. Both were awarded a certificate of completion on June 12, 2013. As a Lead Car Inspector, they were trained and tasked with noting all kinds of safety concerns in Amtrak cars, both inside and out. This was done by literally walking through the cars and walking around the cars and writing down the defects. The defects were tabulated on sheets of paper and then transferred onto Amtrak forms called Maintenance Analysis Program Worksheets. These sheets were then in turn to be used to guide the maintenance and repair of the cars.

On June 26, 2013, Foreman Felix Hull threatened Mr. Polk and Mr. Dendy with disqualification from the job if their jobs if they did not stop finding so many safety defects. This was in response to both men turning in pages of defects from the cars they had inspected shortly before that. Amtrak, through General Foreman Joe Lampey, made good on those threats by disqualifying both men on July 1, 2013. This forced the men to go to a different shift, as well as standing as an example to others what happens when you do your safety-related job at Amtrak – you get punished.

PROPOSED FINDINGS

Respondent is a railroad carrier within the meaning of 49 U.S.C. §§ 20109 and 20102. Respondent is engaged in interstate and/or foreign commerce within the meaning of 49 U.S.C. § 20109. Complainant is a member of the Transport Workers Union (TWU). Respondent employed Complainant as a Car Inspector.

RESPONDENT'S LIABILITY

APPLICABLE PROVISIONS OF FRSA

Complainant hereby alleges that Respondent violated 49 U.S.C.§ 20109(a) and (b), which provide:

(a) A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done –

> **(1)** to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal

grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—

(A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95–452);
(B) any Member of Congress, any committee of Congress, or the Government Accountability Office; or
(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

(2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;

(3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding;

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

(5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board;

(6) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation; or

(7) to accurately report hours on duty pursuant to chapter 211.

(b) Hazardous Safety or Security Conditions.—

(1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for—

(A) reporting, in good faith, a hazardous safety or security condition;

(B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee’s duties, if the conditions described in paragraph (2) exist; or

(C) refusing to authorize the use of any safety-related equipment, track, or structures, if the employee is responsible for the inspection or repair of the equipment, track, or structures, when the employee believes that the equipment, track, or structures are in a hazardous safety or security condition, if the conditions described in paragraph (2) exist.

(2) A refusal is protected under paragraph (1)(B) and (C) if—
(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that—

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

(C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

ELEMENTS OF FRSA AND BURDENS OF PROOF

Actions brought under FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford. Aviation Investment and Reform Act for the 21st Century. ("AIR 21") *See* 40 U.S.C. § 201209(d)(2)(A)(i). Accordingly, to prevail, a FRSA complainant must demonstrate that: (1) the employer is subject to the Act; (2) the employee is a covered employee under the Act; (3) the employee engaged in protected activity, as statutorily defined; (4) the employer knew that the employee engaged in the protected activity; (5) the employee suffered an unfavorable personnel action; and (6) the protected activity was a contributing factor in the unfavorable personnel action. *See* 40 U.S.C. § 42121(b)(2)(B)(iii); Clemmons v. Ameristar Airways Inc., et al., ARB No. 05-048, ALJ No. 2004-AIR-11, slip op at 3(ARB June 29, 2007).

The term "demonstrate" as used in AIR-21, and thus FRSA, means to "prove by a preponderance of the evidence." *See* Peck v. Safe Air Int'l, Inc., ARB No. 02-028, ALJ

No. 01-AIR-3, slip op. at 9 (ARB Jan. 30, 2004). Thus, Complainant bears the burden of providing his case by a preponderance of the evidence. If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior. *See* 49 U.S.C. §§ 20109(d)(2)(A)(i); 42121(b)(2)(B)(iii(iv).

Turning to each of these requirements specifically:

(1) the employer is subject to the Act;

It is undisputed that Respondent Amtrak is an employer subject to the FRSA.

(2) the employee is a covered employee under the Act;

It is undisputed that Mr. Polk is a covered employee under the Act.

(3) the employee engaged in protected activity, as statutorily defined;

Mr. Polk engaged in protected activity when he conducted the required inspections of the train cars, in fact finding numerous deficiencies and reported those deficiencies to the company.

(4) the employer knew that the employee engaged in the protected activity;

It is undisputed that Respondent knew that Mr. Polk engaged in the protected activity. It is in fact this precise activity that prompted the disqualification.

(5) the employee suffered an unfavorable personnel action; and

It is undisputed that the disqualification, and concomitant loss of pay is an unfavorable personnel action, as well as being forced to work a different shift.

(6) the protected activity was a contributing factor in the unfavorable personnel action. "A contributing factor is any factor which, alone or in connection with other factors, tends to affect in any way the outcome of railroad's decision." Thus, if the employee's protected activity played any part at all, even to the slightest degree, in bringing about

the railroad's adverse discriminatory actions, then that protected activity was a contributing factor. Araujo v. NJ Transit Rail Operations, Inc., 708 F.3d 152 (3d Cir. 2013) citing OSHA's Final Interim Rule for "Procedures for the Handling of Retaliation Complaints under the Federal Rail Safety Act," at III. Summary and Discussion of Regulatory Provisions, Section 1982.104, quoting *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), and 135 Cong. Rec. 5033 (1989). 29 CFR Section 1982.104; *Majali v. U.S.Dept. of Labor*, 294 Fed. Appx. 562, 566-567, 2008 U.S.App. LEXIS 29738 (11th Cir. 2008).

Thus, not only was the protected activity a contributing factor, it was in fact the sole basis for the disqualification. Respondent violated the statutes involved when it disqualified Mr. Polk for writing up too many deficiencies.

CONCLUSION

In short, Respondent truly does not see the error of its ways or the chilling effect that its actions have on worker and public safety. By disqualifying Mr. Polk, the carrier is making sure all others see what happens when someone finds safety violations, thereby slowing the turnaround of train cars. Mr. Polk is entitled to reinstatement with full back pay, plus interest, plus compensation for his stress and mental anguish and the tarnish placed on his reputation, as well as punitive damages and attorney fees and any costs related to asserting his rights.

Very truly yours,
Flynn & Wietzke, PC

By: [signature]
MARC WIETZKE

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